HALAMAN PERDANA SDN BHD v. PENTADBIR TANAH DAERAH HULU SELANGOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ANANTHAM KASINATHER JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: B-01-285-06-2012]
15 FEBRUARY 2016

LAND LAW: *Acquisition of land – Award of compensation – Appeal against quantum – Whether appeal revolved around amount of compensation – Whether fell within ambit of ss. 40D(3) and 49(1) of Land Aquisition Act 1960 – Whether appellant could appeal against order of compensation issued by High Court – Land Acquisition Act 1960, ss. 40D(3) & 49(1)*

CIVIL PROCEDURE: *Appeal – Decision of trial judge – Land acquisition – Whether statute expressly precluded appellant from appealing – Whether right to appeal a creature of statute – Whether appeal maintainable – Courts of Judicature Act 1964, s. 68(1) – Whether constitutional*

The applicant was the registered owner of two lot of lands, namely Lot 4460 and Lot 27507 ('the said lands'). The said lands were acquired under s. 3 of the Land Acquisition Act 1960 ('LAA'). An enquiry was conducted by the Land Administrator pursuant to s. 12 of the LAA, where a compensation of RM4,839,183 was awarded for the acquisition of Lot 4460 and RM1,840,388.85 was awarded for the acquisition of Lot 27507. The applicant objected to the amount of compensation awarded and filed a written application to the Land Administrator pursuant to s. 38(1) of the LAA for the matter to be referred to the High Court ('the land reference proceedings'). Upon consideration on the market value of the said lands, the High Court Judge awarded, *inter alia*, additional compensation of RM1,675,583.77 and RM777,825.70 for injurious affection for the said lands. Dissatisfied with the said decision, the applicant appealed to the Court of Appeal. At the outset of the hearing of the appeal, the respondent raised a preliminary objection ('PO') that this court had no jurisdiction to hear the appeal in view of s. 40D of the LAA. The applicant's complaint was basically on the amount of compensation awarded by the High Court and not on the wrong principle of law applied by the High Court in its assessment and arriving at the amount of compensation. Therefore, the applicant was precluded by virtue of s. 40D(3) and s. 49(1) of the LAA from appealing against the order of compensation. The applicant, on the other hand, argued that the appeal herein was not caught by s. 40D(3) and the proviso to s. 49(1) of the LAA. The applicant submitted that the right of the applicant to appeal against any decision of the High Court was guaranteed by art. 121(1B)(a) of the Federal Constitution. Thus, it was not permissible to invoke s. 68(1)(d)

of the Courts of Judicature Act 1964 ('CJA') to constrain the meaning of art. 121(1B)(a) of the Federal Constitution. To that end, the applicant argued that s. 68(1)(d) of the CJA, s. 40D(3) and s. 49(1) of the LAA were unconstitutional. The applicant further argued that even if s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA were constitutional, there was a misdirection of law on the part of the High Court Judge when assessing compensation which rendered the matter appealable.

Held (upholding preliminary objection; dismissing appeal with costs)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The constitutional challenge mounted by the applicant, in relation to s. 40D(3), s. 49(1) of the LAA and s. 68(d) of the CJA was not raised as a ground of appeal in the applicant's memorandum of appeal nor was it raised before the learned High Court Judge during the land reference proceedings. The issue of the constitutionality of s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA is a substantive issue constituting a separate cause of action and could only be heard and determined upon a suit being filed to that effect in the court of first instance, namely the High Court. The applicant could not, in an appeal from a decision of the High Court pursuant to a land reference proceedings under s. 38 of the LAA, where the issue of constitutionality was not raised, mount a collateral attack on the constitutionality of s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA. (paras 24 & 27)

(2) The three main factors cited by the applicant in establishing misdirections of law were all factors which affect the quantum or amount of compensation to be paid out to an affected person under the LAA. Thus, the applicant's appeal revolved entirely around the amount of compensation awarded by the court, in particular, the assessment carried out by the court in arriving at the amount awarded. In that regard, the applicant's appeal fell squarely within the ambit of s. 40D(3) and s. 49(1) of the LAA and was, by virtue of the decision in *Calamas* and *Syed Hussein Syed Junid & Ors*, not appealable. The appeal herein was nothing more than an attempt to circumvent the salient provisions of ss. 40D and 49(1) of the LAA which precluded any party from appealing against the award of compensation. (paras 29, 31 & 32)

Bahasa Malaysia *Headnotes*

Pemohon adalah pemilik berdaftar dua lot tanah iaitu Lot 4460 dan Lot 27507 ('tanah tersebut'). Tanah tersebut diperolehi di bawah s. 3 Akta Pengambilan Tanah 1960 ('APT'). Berdasarkan siasatan yang dijalankan oleh Pentadbir Tanah menurut s. 12 APT, pampasan sebanyak RM4,893,183 diawardkan untuk pengambilan tanah Lot 4460 dan RM1,840,388.85 diawardkan untuk pengambilan tanah Lot 27507. Pemohon membantah

jumlah pampasan yang diawardkan dan memfailkan permohonan bertulis kepada Pentadbir Tanah menurut s. 38(1) APT bagi perkara itu dirujuk ke Mahkamah Tinggi ('prosiding rujukan tanah'). Setelah menimbangkan nilai pasaran tanah tersebut, Hakim Mahkamah Tinggi mengawardkan, antara lain, pampasan tambahan sebanyak RM1,675,583.77 dan RM777,825.70 bagi penjejasan tanah tersebut. Tidak berpuas hati dengan keputusan tersebut, pemohon merayu kepada Mahkamah Rayuan. Pada permulaan perbicaraan rayuan, responden membangkitkan bantahan awal ('BA') bahawa mahkamah ini tidak mempunyai bidang kuasa untuk mendengar rayuan menurut s. 40D APT. Aduan pemohon adalah berkaitan dengan jumlah pampasan yang diawardkan oleh Mahkamah Tinggi dan bukan prinsip undang-undang yang diguna pakai oleh Mahkamah Tinggi dalam penilaiannya dan dalam penentuan jumlah pampasan. Lantaran, pemohon dihalang menurut s. 40D(3) dan s. 49(1) APT dari membuat rayuan terhadap perintah pampasan. Pemohon sebaliknya menghujahkan bahawa rayuan di sini tidak termaktub oleh s. 40D(3) dan proviso kepada s. 49(1) APT. Pemohon mengemukakan bahawa hak pemohon untuk merayu terhadap apa-apa keputusan Mahkamah Tinggi dijamin oleh per. 121(1B)(a) Perlembangan Persekutuan. Maka, adalah tidak dibenarkan untuk menggunakan s. 68(1)(d) Akta Mahkamah Kehakiman 1964 ('AMK') untuk mengekang makna per. 121(1B)(a) Perlembagaan Persekutuan. Oleh itu, pemohon menghujahkan bahawa s. 68(1)(d) AMK, s. 40D(3) dan s. 49(1) APT tidak berpelembagaan. Pemohon seterusnya mendakwa bahawa walaupun s. 40D(3), s. 49(1) APT dan s. 68(1) AMK tidak berpelembagaan, terdapat salah arahan undang-undang oleh Hakim Mahkamah Tinggi apabila mentaksir pampasan yang menyebabkan perkara itu dirayu.

Diputuskan (mengekalkan bantahan awal; menolak rayuan dengan kos) Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Cabaran perlembagaan dikemukakan oleh pemohon berhubung dengan s. 40D(3), s. 49(1) APT dan s. 68(d) AMK tidak dibangkitkan sebagai alasan rayuan dalam memorandum rayuan pemohon ataupun dibangkitkan kepada Hakim Mahkamah Tinggi semasa prosiding rujukan tanah. Isu perlembagaan s. 40D(3), s. 49(1) APT dan s. 68(1) AMK adalah isu substantif yang mempunyai kausa tindakan berbeza dan hanya boleh didengar dan ditentukan berdasarkan guaman yang difailkan bagi maksud itu dalam mahkamah yang membicarakan, iaitu Mahkamah Tinggi. Pemohon tidak boleh, dalam rayuan keputusan Mahkamah Tinggi menurut prosiding rujukan tanah di bawah s. 38 APT, di mana isu perlembagaan tidak berbangkit, melancarkan serangan kolateral terhadap perlembagaan s. 40D(3), s. 49(1) APT dan s. 68(1) AMK.

(2) Tiga faktor utama yang dipetik oleh pemohon dalam mewujudkan salah arahan undang-undang adalah faktor-faktor yang memberi kesan kepada kuantum atau jumlah pampasan yang akan dibayar kepada orang terjejas di bawah APT. Oleh itu, rayuan pemohon berkisar sepenuhnya terhadap award jumlah pampasan oleh mahkamah khususnya pentaksiran yang dibuat oleh mahkamah dalam menentukan jumlah award. Sehubungan itu, rayuan pemohon yang termaktub dalam lingkungan s. 40D(3) dan s. 49(1) APT adalah, menurut keputusan dalam *Calamas* dan *Syed Hussein Syed Junid & Ors*, tidak boleh dirayu. Rayuan di sini hanyalah satu percubaan memintasi peruntukan penting ss. 40D dan 49(1) APT yang menghalang mana-mana pihak daripada merayu terhadap award pampasan.

Case(s) referred to:

Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang [2011] 5 CLJ 125 FC ***(foll)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Koriah Sudar v. Pentadbir Tanah Kuala Langat [2013] 5 CLJ 571 CA ***(refd)***

Salimuddin Ahammed v. Rahim Sheik AIR 1926 Cal. 1113 ***(refd)***

Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis [2013] 9 CLJ 152 FC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 68(1)(d)

Federal Constitution, arts. 8, 13(2), 121(1B)(a), (b)

Land Acquisition Act 1960, ss. 3, 12, 38(1), 40D(3), 49(1)

For the appellant - Malik Imtiaz Sarwar (Pavendeep Singh with him); M/s Malik Imtiaz Sarwar

For the respondent - Rafiqha Hanim Mohd Rosli; State Legal Advisor, Selangor

[Appeal from High Court, Shah Alam; Suits No: 15-48-2011 & 15-49-2011 (affirmed)]

Reported by Sandra Gabriel

JUDGMENT

Alizatul Khair Osman JCA:

Introduction

[1] This appeal arose from the decision of the learned High Court judge in two Land References namely suit Nos. 15-48-2011 and 15-49-2011 awarding the appellant (the applicant in the court below) an additional compensation of RM1,675,583.77 for the acquisition of two lots held under Grant 34719, Lot 4460 Mukim Serendah, Daerah Hulu Selangor, Selangor Darul Ehsan and Grant 93472, Lot 27507 Seksyen 20, Mukim Bandar Serendah, Daerah Hulu Selangor, Selangor Darul Ehsan (individually referred to as 'Lot 4460' and 'Lot 27507' respectively but collectively referred to as the 'said lands'); and additional compensation of RM777,825.70 for injurious affection of the said lands.

[2] The parties in this appeal will be referred to in their original capacity in the High Court.

Salient Facts

[3] The applicant was the registered owner of the said lands. The category of land use of the said lands was 'building'. The applicant had obtained approvals from the relevant authorities to convert the said lands into residential and commercial areas (the applicant's project).

[4] The said lands were acquired under s. 3 of the Land Acquisition Act 1960 (LAA) pursuant to Gazette Notification No. 4284 dated 23 December 2010. The purpose of the acquisition was for "Projek Lebuhraya Utara-Selatan Cadangan Persimpangan Bertingkat dan Plaza Tol Sungai Buaya, Bandar Serendah dan Mukim Serendah, Daerah Hulu Selangor, Negeri Selangor".

[5] Pursuant to s. 12 of the LAA, an enquiry was conducted by the Land Administrator. Upon conclusion of the enquiry, a written award in Form G was prepared by the Land Administrator in respect of the said lands which is as follows:

(a) Lot 4460

Pampasan Tanah: RM 4,453,137.00 (Tanah dinilai dengan harga RM 405,000.00 sehektar).

Penjejasan : RM 386,046.00

RM 4,839,183.00

(b) Lot 27507

Pampasan Tanah: RM 1,273,360.50 (Tanah dinilai dengan harga RM 405,000.00 sehektar).

Penjejasan : RM 567,028.35

RM 1,840,388.85

[6] The applicant objected to the amount of compensation awarded and filed written application in Form N to the Land Administrator pursuant to s. 38(1) of the LAA for the matter to be referred to High Court for its determination (the Land Reference proceedings).

[7] The Land Reference proceedings was presided by the learned judge and assisted by two assessors, namely Pn Kartini, a Government Valuer and Pn Noorjila, a private valuer. Upon hearing the parties and having taken into consideration the opinion of the two assessors on the market value of the said lands, the learned judge awarded, *inter-alia*, additional compensation of RM1,675,583.77 for the said lands and RM777,825.70 for injurious affection in respect of the said lands.

[8] Dissatisfied with the decision, the applicant appealed to the Court of Appeal. Hence this appeal.

The Appeal

[9] Before us, the applicant filed notice of motion *via* encl. 12(a) for leave to include an affidavit affirmed by Chang Yao Kuang dated 9 September 2013 to have the documents annexed to his affidavit (exh. "A-1") be admitted as further evidence in the appeal herein.

[10] At the outset of the hearing of the motion and the substantive appeal, learned counsel for the applicant informed the court that the respondent had raised a Preliminary Objection that the court has no jurisdiction to hear the appeal in view of s. 40D of the LAA and the recent Federal Court decision in *Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis* [2013] 9 CLJ 152 (Permohonan Sivil No. 08(f)-633-08/2012(R)) and *Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang* [2011] 5 CLJ 125.

[11] In the light of the Preliminary Objection (PO) raised by the respondent we were constrained to deal with the PO first before hearing the appeal on its merits.

Preliminary Objection

[12] Learned Senior Federal Counsel (SFC) on behalf of the respondent contended that this court has no jurisdiction to hear the appeal in view of s. 40D of the LAA. This legal proposition is based primarily on two recent Federal Court decisions namely *Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang* [2011] 5 CLJ 125 and *Syed Hussain Syed Junid & Ors v. Pentadbir Tanah Negeri Perlis* [2013] 9 CLJ 152 (Permohonan Sivil No. 08(f)-633-08/2012(R)).

[13] In *Syed Hussain Syed Junid & Ors* (*supra*), the Federal Court in discussing the effect of s. 40D of the LAA adopted the reasoning of the Federal Court in *Calamas* (*supra*). Raus Sharif PCA speaking for the Federal Court observed as follows:

> 20. With the introduction of s. 40D and the amendment to the proviso of s. 49(1), the intention of the Parliament is very clear i.e., to preclude any party from appealing against the order of compensation made by the High Court. The effect of the introduction of s. 40D and the amendment to the provision of s. 49(1) of the LAA was discussed in *Calamas Sdn Bhd v. Pentadbir Tanah Batang Padang* [2011] 5 CLJ 125. Hashim Yusoff FCJ speaking for the Federal Court said as follows:
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> > It is trite law that courts must give effect to the clear provisions of the law. In the instant appeal, I do not see anything ambiguous in ss. 40D(3) and 49(1) of the Act. In view of this, I am of the view that the appellant is precluded from appealing against the order compensation issued by the learned trial judge.
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> 21. We have no reason to depart from the above view.

[14] Learned SFC submitted that in this appeal the applicant's complaint was basically on the amount of compensation awarded by the High Court and not on the wrong principle of law applied by the High Court in its assessment and arriving at the amount of compensation. Thus it falls squarely within the scope of s. 40D of the LAA and in view of the decision of the Federal Court above which is binding on this court, this court has no jurisdiction to hear the appeal as the applicant is preluded, by virtue of s. 40D(3) and s. 49(1) of the LAA from appealing against the order of compensation made in the Land Reference by the High Court.

[15] Learned counsel for the applicant on the other hand, argued that the appeal herein is not caught by s. 40D(3) and the proviso to s. 49(1) of the LAA for the following reasons:

(i) the right of the applicant to appeal against any decision of the High Court is guaranteed by art. 121(1B)(a) of the Federal Constitution (the first reason); and

(ii) even if the said provisions are constitutional, their purpose must be understood by reference to the constitutional guarantee of access to justice and due process in art. 8 of the Federal Constitution (the second reason).

[16] In respect of the first reason, learned counsel for the applicant relied on art. 121(1B)(a) and art. 121(1B)(b) of the Federal Constitution. Essentially learned counsel for the applicant's argument is that whilst art. 121(1B)(b) of the Federal Constitution vests the Court of Appeal such further or other jurisdiction as may be conferred by federal law, its constitutionally vested jurisdiction under art. 121(1B)(a) gives it the power to determine all appeals arising from the High Court without limitation.

[17] This implication arises from the plain and obvious meaning of art. 121(1B)(a) and (b) of the Federal Constitution. Therefore, it is not permissible to invoke s. 68(1)(d) of the Courts of Judicature Act 1964 ('CJA') to constrain the meaning of art. 121(1B)(a) of the Federal Constitution. To that end, s. 68(1)(d) of the CJA, s. 40D(3) and s. 49(1) of the LAA are unconstitutional.

[18] With respect to s. 68(1)(d) of the CJA which stipulates that no appeal shall be brought to the Court of Appeal where a judgment or order of High Court is expressly declared to be fixed by any written law for the time being in force, learned SFC in her written submission had referred to the case of *Koriah Sudar v. Pentadbir Tanah Kuala Langat* [2013] 5 CLJ 571. The court in dismissing the appeal against the High Court's order of compensation, observed, *inter-alia*, as follows:

> [17] *Section 40D of the Act and s. 68(1)(d) of the Courts of Judicature Act 1964 are very clear and we must give effect to the unambiguously expressed intent of these sections*. In the case of *Dupont Steels Ltd v. Sirs* [1980] 1 WLR 142, Lord Diplock had this to say:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider that the consequences of doing so would be inexpedient or even unjust or immoral.

[18] It is trite that there is no right of appeal against the decision of a court of competent jurisdiction unless the right is expressly provided for. The right to appeal is a creature of statute. It cannot be given by mere implication. (See *Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd* [2003] 1 CLJ 429; *Dr. Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445 (FC); *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201.

[19] **The Act, being a special legislation, setting out a self-contained code, the general law on appeals is therefore impliedly excluded.**

(emphasis added)

[19] Learned counsel for the applicant countered that this aspect of the analysis of art. 121(1B)(a) and (b) of the Federal Constitution was not considered by the Federal Court in *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445. Learned counsel's submitted that the Federal Court in the aforesaid case had adopted a narrow construction of art. 121(1B) when it held that:

> The word "jurisdiction" in art. 121(1B) of the Constitution, in a narrow and strict meaning, merely confers on the Court of Appeal the authority and power to hear and determine appeals. Further, art. 121(1B)(a) does not provide for the Court of Appeal to hear "all" or "any" appeals from the High Court. In the circumstances, the Court of Appeal's jurisdiction, in the present case, to hear appeals from the High Court should be exercised by reference to the CJA. It was clear from the reading of s. 4 of the CJA that the legal status accorded to the CJA is much higher than any other Act of Parliament.

In doing so, the Federal Court had failed to apply the settled principles of constitutional interpretation, as decided by the Federal Court in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29, that is, that constitutional provisions are to be interpreted broadly and dynamically.

[20] As for the second reason, learned counsel for the applicant submitted that even if the aforesaid provisions are constitutional their purpose must be understood by reference to the constitutional guarantee of access to justice and due process as provided in art. 8 of the Federal Constitution. Thus, s. 40D(3) and s. 49(1) of the LAA cannot be read as precluding a right of appeal on misdirections of law. It is the applicant's counsel's contention that the right to appeal against a misdirection of law in the process of determining fair compensation is integral to an effective application of the guarantee of

'adequate compensation' under art. 13(2) of the Federal Constitution. Learned counsel relied on the case of *Salimuddin Ahammed v. Rahim Sheik* AIR 1926 Cal. 1113, a decision of the Calcutta High Court which held that:

> In a matter like this which relates to the curtailment of a right of appeal, if there is the slightest doubt in one's mind, the benefit of that doubt should go to the party who seeks to appeal.

Our Decision

[21] We upheld the Preliminary Objection after hearing submissions from both counsel and learned SFC.

[22] We agree with learned SFC that in view of the decision of the Federal Court in both *Calamas* and *Syed Hussain Syed Junid & Ors* which is binding on this court, this court has no jurisdiction to hear this appeal.

[23] As held by the Federal Court the effect of s. 40D(3) and the amendment to the proviso s. 49(1) of the LAA is to preclude any party from appealing against the order of compensation made by the High Court.

[24] As regards the constitutional challenge mounted by the applicant, in relation to s. 40D(3), s. 49(1) of the LAA and s. 68(1)(d) of the CJA, (*supra*) we note that this issue was not raised as a ground of appeal in the applicant's memorandum of appeal nor was it raised before the learned High Court Judge during the Land Reference proceedings.

[25] For ease of reference we set out below s. 40D(3), s. 49(1) of the LAA and s. 68(1)(d) of the CJA.

Section 40D(3) states:

> **Any decision made under this section is final and there shall be no further appeal to a higher court on the matter**.

Section 49(1) reads:

> Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to section 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court.
>
> **Provided that where the decisions comprises an award of compensation there shall be no appeal therefrom**; and

Section 68(1) of the CJA stipulates that:

> No appeal shall be brought to the Court of Appeal in any of the following cases:
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> (a) ...
>
> (b) ...
>
> (c) ...

A (d) **where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final**.

(emphasis added)

[26] Learned counsel for the applicant argued that whilst the issue relating to s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA have been dealt with by the Federal Court in *Calamas* and *Syed Hussain Syed Junid & Ors* and by the Court of Appeal in *Koriah Sudar* (*supra*) this was the first time that this court is confronted with these issues in the context of art. 121(1B) of the Federal Constitution. Thus, whilst this court may be bound by the Federal Court's decision in *Calamas* and *Syed Hussein Syed Junid & Ors*, this court is not constrained from hearing and determining the issue of s. 40D, s. 49(1) of the LAA and s. 68(1)(d) of the CJA in the context of art. 121(1B) of the Federal Constitution.

In other words learned counsel is inviting this court in the exercise of its appellate jurisdiction to determine the constitutionality of s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA in the context of art. 121(1B) of the Federal Constitution.

[27] In our view the issue of the constitutionality of s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA is a substantive issue constituting a separate cause of action and can only be heard and determined upon a suit being filed to that effect in the court of first instance, namely the High Court. The applicant cannot, in an appeal from a decision of the High Court pursuant to a Land Reference proceedings under s. 38 of the LAA, where the issue of constitutionality was not raised, mount a collateral attack on the constitutionality of s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA.

Counsel for the applicant argued that this issue is one of jurisdiction, and therefore can be raised at the appellate stage. However to our minds, counsel here is seeking to challenge the constitutional validity of the provisions of the LAA and not the jurisdiction of the court to hear the appeal.

Further, this would entail this court determining the issue in the exercise of its original jurisdiction which this court clearly does not have under the CJA.

[28] As for the second reason, that even if s. 40D(3), s. 49(1) of the LAA and s. 68(1) of the CJA are constitutional there was a misdirection of law on the part of the learned judge when assessing compensation which renders the matter appealable.

[29] The three main factors cited by counsel in establishing misdirections of law are:

(a) Failure to appreciate development potential of the said land

Learned counsel contended that the learned judge had failed to appreciate that the category of land use of the said lands was 'bangunan' thus assigning the said lands to a lower value per hectare.

In addition, the learned judge also failed to consider that the said lands had been approved for the construction of luxury bungalows which would bring with it an increased market value.

(b) Unjustified preference of government's valuation

According to counsel there were material deficiencies in the government's valuation of the said lands which would render the award granted by the learned judge as unsafe and lead to a flawed calculation of the proper award of compensation to be paid to the applicant. For example:

(i) the government's valuer had determined the market value of the said lands based on a figure of only RM40.50 smp when the figures for the neighbouring lots were set at RM59.31 smp and RM58.15 smp which were the figures for agricultural land with potential;

(ii) even then the government's valuer in determining the aforesaid figures of RM59.31 smp (as at 4 August 2000), RM58.15 smp (as at 30 January 1997) and RM49.43 smp (as at 15 June 1996) ought to have adjusted these figures so as to reflect the market value of these lands as at the date of acquisition which was on 23 December 2010; and

(iii) the government's valuer had reduced the market value of the said lands to RM405,000 per hectare and RM407,925 per hectare without any reasonable justification when two plots of comparable land PT 11042 and PT 11044 were valued at RM69.90 smp and RM90.65 smp respectively.

(c) Inadequate consideration of injurious affection

Learned counsel for the applicant contended that the learned judge failed to give sufficient consideration to the significant loss suffered by the applicant due to the compulsory acquisition of the said lands in that no structures can be constructed on the portions of the said lands not utilised for the Highway Project. In the event the applicant proceeds with the Highway Project the applicant would incur increased costs if they were to construct any buildings on or around the steep inclines of the elevated highway. The increased costs in carrying on with the applicant's project would result in a loss of profits to the applicant.

[30] With respect, we are unable to see how these factors constitute misdirections of law or give rise to questions of law.

[31] These are all factors which affect the quantum or amount of compensation to be paid out to an affected person under the LAA. That, in our view is not a legal issue nor does it raise any issue of law. The applicant's appeal revolves entirely around the amount of compensation awarded by the court in particular the assessment carried out by the court in arriving at the amount awarded.

A **[32]** In that regard the applicant's appeal falls squarely within the ambit of s. 40D(3) and s. 49(1) of the LAA and is, by virtue of the decision in *Calamas* and *Syed Hussein Syed Junid & Ors*, not appealable. In our view, to borrow the words of the Federal Court in *Syed Hussein Syed Junid & Ors*, "… the appeal herein is nothing more than an attempt to circumvent the salient
B provisions of s. 40D and 49(1) of the LAA which precludes any party from appealing against the award of compensation".

[33] For the above reasons we upheld the Preliminary Objection of the respondent and dismissed the appeal with costs. As we had upheld the Preliminary Objection we did not feel it necessary to hear the appeal on its
C merits.

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